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No. 90-622

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF FLORIDA,

Petitioner,

v.

LUZ PIEDAD JIMENO and ENIO JIMENO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

EMERGENCY MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS OUT OF TIME

The National Association of Criminal Defense Lawyers ("NACDL"), by and through counsel, President-

Elect Jeffrey S. Weiner and Weiner, Robbins, Tunkey, Ross, Amsel & Raben, P.A., pursuant to Supreme Court Rule 21.1, moves this Court for leave to file an *amicus curiae* brief in support of the Respondents out of time. As grounds therefor, NACDL states as follows:

1. NACDL is a national bar organization with membership exceeding 25,000 lawyers focused exclusively on criminal law matters. It is dedicated to the protection of the Bill of Rights. Its *Amicus Curiae* Committee regularly files briefs in this Court, as well as the federal circuit and district courts and state appellate and trial courts.

2. The captioned case raises a crucial issue: whether police violate the fourth amendment when, though their suspicion has focused on a closed container located in a suspect's automobile, they fail to request permission to search the container and instead request, and only obtained, consent to search the automobile. This issue is of great importance not only because of the

practical impact it will have on the integrity of investigative police procedures nationwide, but also because of the important jurisprudential issues that must be addressed to resolve the case. The case promises to bring a landmark decision.

3. Oral argument is set on March 25, 1991.

4. Despite NACDL's efforts to monitor all petitions for writs of certiorari concerning criminal related matters which come before this Court, the instant case escaped our attention. NACDL first took notice of the case approximately two weeks ago when counsel for the Respondents (who shares an office in the same building as undersigned counsel) contacted undersigned counsel and requested the input, assistance, and participation in oral argument of NACDL. Undersigned counsel immediately contacted the Clerk of this Court to determine whether there was any emergency vehicle to surmount the apparent bar of Supreme Court Rule 37.3 and simultaneously marshalled resources to begin

researching the important issue before this Court.

5. NACDL submits that it has important legal and policy arguments to offer that have not been made by the Respondents which must be considered by the Court to arrive at a legally correct decision. *See* S.Ct. R. 37.1.

6. The Respondents have specifically requested NACDL to file a brief in support of them. NACDL has contacted counsel for the Petitioner who states that he has no objection to their participation. The United States has filed an amicus curiae brief in support of the Petitioner and will be participating in oral argument.

7. Undersigned counsel has been a member in good standing of this Court's Bar since 1978.

8. NACDL has contemporaneously filed its brief in support of Respondents and emergency motion for leave to participate in oral argument.

WHEREFORE, the NACDL respectfully prays

that this court accept their contemporaneously filed *Amicus Curiae* brief in support of Respondents and consider the arguments a they bear on the merits of this case.

Respectfully submitted,

BY: _____

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QUESTION PRESENTED

Whether the police violated the fourth amendment when, though their suspicion had focused on a closed paper bag which had been placed in the Respondents' automobile, they failed to request permission to search the bag and instead requested and only received consent to search the automobile.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, The National Association of Criminal Defense Lawyers, is a national bar organization with membership exceeding 25,000 lawyers dedicated exclusively to criminal law matters. Its members practice in virtually every state and federal court in this country. They meticulously study and analyze police procedure on a daily basis. The organization is dedicated to the protection and preservation of the Bill of Rights. It is most concerned with any judicial decision that might diminish the protections of the fourth amendment.

The position taken by the State of Florida and *Amicus Curiae* the United States threatens to carve away another substantial piece of the fourth amendment and to significantly diminish the privacy and security rights of the people against our government. It will lead to an increase in the type of deception and abuse intended to be prevented by that amendment. It will increase the

incidents of searches and seizures conducted without warrant, probable cause, or actual authority to conduct the search thus wholly circumventing the fourth amendment. It will dramatically change police investigative procedures. For these reasons, *Amicus Curiae* is committed to intervening on behalf of the Respondents and fourth amendment and to provide its assistance in resolving this important matter.

STATEMENT OF THE FACTS

Amicus deems the following facts to be particularly crucial to this Court's resolution of the issue presented:

1. The object of officer Trejillo's suspicion was the brown paper bag he ultimately searched. After his suspicion arose that the Respondents were involved in a drug transaction, he observed them remove the paper bag from their vehicle, bring it into the apartment

minutes later after he suspected the drug transaction had been concluded. Pet. App. A.6.; Suppression HEaring Tr.20-21.

2. Officer Trejillo never asked the defendants if he could search the brown paper bag.

3. Although defendant Jimeno had been advised by officer Trejillo that he believed Jimeno was carrying narcotics, upon acceding to the officer's request to search the vehicle, Jimeno indicated he was not vulnerable to the search he had authorized by indicating he had nothing to hide. Pet. App. A.6.; Suppression Hearing Tr. 23-24.

4. Upon receiving Jimeno's consent, Officer Trejillo went immediately to the location where he believed the brown paper bag would be, seized it, and opened it. Pet. App. A.6.; Suppression Hearing Tr. 24, 26-28, 37, 48-49.

SUMMARY OF THE ARGUMENT

The question of whether the police search of a particular area or item exceeds the scope of a defendant's consent is no different from the question of whether the defendant voluntarily consented to a search of the targeted area or item. Framed in this way, it is obvious that in order to establish valid consent, the prosecution bears the burden of proving that the defendant, in fact, voluntarily consented to the search. In other words, the proper scope of the search is determined by the subjective intent of the consenter.

The Petitioner's suggestion that this court should adopt an objective, "reasonableness" test, transforming the inquiry to "what an objective viewer, knowing all the facts, would have understood the scope of the consent granted to have been," must be rejected. The inquiry this

Court has always prescribed in determining the validity of a consent search has focused on whether the particular consenter has, in fact, given voluntary consent. All of the factors used to conduct this appropriate inquiry focus on the subjective state of mind of the consenter. Moreover, a test based on the consenter's subjective intent is necessary to insure that police do not supersede the only authority they have to search.

This Court's decision in ***Illinois v.Rodriguez***, __ U.S. __, 110 S.Ct. 2793 (1990), does not support application of an objective "reasonableness" test. There, it was unquestionable that police had obtained voluntary consent, in fact; the only issue was whether the third-party had authority to consent. This Court was not concerened that deceit or subtle coercion may have visciated the third-party's consent. Additionally, the objective "reasonableness" test was adopted in recognition that it was unfair to burden police officers

with making especially difficult judgment calls as whether the party has authority to consent. By contrast, in the instant case, where the officer eliciting consent failed to advise the Respondents of the true object of his suspicion, this Court must be concerned that this deception resulted in Respondent Enio Jimeno uttering the words that the officer claimed authorized his search of the bag. Additionally, unlike the issue in ***Rodriguez***, there is no need for the officer to exercise any judgment - all doubt can be eliminated by simply asking the suspect if he specifically consents to a search of the area of object of the officer's suspicion.

Moreoer, an officer should obtain specific authorization to search a specific object or area of suspicion to prevent a possibility of official coercion, deception, or other abuses resulting in searches unauthorized by the subject. Requiring an officer to clarify the scope of the individual's consent would

prevent or at least minimize the element of coercion inherent in any confrontation between the police and a citizen. Such a requirement would also simplify the administrative burden on the courts in resolving motions to suppress based purportedly upon consent and would insure the accuracy of those determinations. Such a rule would provide a quick and simple answer for law enforcement officers involved in otherwise quickly developing investigations and would remove all guess work on the part of the officer regarding what may and what may not be searched.

Finally, any distinction in the permissible scope of a consent search based on the nature of the container encountered will deny equal protection and result in an in an impermissible discriminatory application of the fourth amendment. Such a distinction would promote and ingidious distinction between rich and poor which is repugnant to our Constitution.

ARGUMENT

THE POLICE VIOLATED THE FOURTH AMENDMENT WHEN, THOUGH THEIR SUSPICION HAD FOCUSED ON A CLOSED PAPER BAG LOCATED IN THE RESPONDENTS' AUTOMOBILE, THEY FAILED TO REQUEST PERMISSION TO SEARCH THE BAG AND INSTEAD REQUESTED AND ONLY OBTAINED CONSENT TO SEARCH THE AUTOMOBILE.

A. WHERE THE PROSECUTION RELIES UPON CONSENT TO JUSTIFY A SEARCH, IT MUST PROVE THAT THE SUBJECT, IN FACT, CONSENTED VOLUNTARILY NOT MERELY THAT A HYPOTHETICALLY OBJECTIVE POLICE OFFICER WOULD HAVE REASONABLY BELIEVED THAT A VOLUNTARY CONSENT HAD BEEN CONVEYED.

Although a consent search "is a constitutionally permissible and wholly legitimate aspect of effective police activity," ***Schneckloth v. Bustamonte***, 412 U.S. 218, 228 (1973), it is nonetheless an exception to the fourth amendment's warrant requirement and is presumptively

unreasonable. *See* ***Skinner v. Railway Labor Executives Ass'n.,*** 489 U.S. 602 (1989); ***Katz v. United States***, 389 U.S. 347, 357 (1967). The fourth amendment's strong preference for warrants "is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its purpose and scope." ***Skinner***, 109 S.Ct. at 1415.

Recognizing the grave danger of police coercion and abuse inherent in securing consent, this Court has warned that consent searches cannot be approved without the most careful scrutiny. ***Schneckloth*** at 229. Thus, unlike where police have secured a warrant, the prosecution bears the burden of proving consent. It must do so by at least a preponderance of the evidence.[1] It

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[1] Several federal circuit courts require clear and convincing evidence to establish consent or apply other stricter standards. *See, e.g.,* ***United States v. Corral,*** 899

must prove any consent was given freely and voluntarily. *E.g.*, ***United States v. Mendenhall***, 446 U.S. 544, 557-60 (1980); ***Schneckloth*** at 241. The existence of consent is not lightly to be inferred; indeed courts indulge every reasonable presumption against waiver of such fundamental constitutional rights. *E.g.*, ***United States v. Shaibu***, 895 F.2d 1291, 1293-94 (9th Cir. 1990); ***United States v. Benitez***, 899 F.2d 995, 998 (10th Cir. 1990).[2] Most

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F.2d 991, 994 (10th Cir. 1990); ***United States v. Shaibu***, 895 F.2d 1291, 1293-94 (9th Cir. 1990); ***United States v. Jones***, 846 F.2d 358, 360 (6th Cir. 1988). ***But see United States v. Hurtado***, 905 F.2d 74 (5th Cir. 1990)(*en banc*)(overruling long standing line of cases requiring consent to be proven by clear and convincing evidence in favor of preponderance standard).

[2] The Court in ***Schneckloth***, the Court, distinguished the waiver of fourth amendment rights from the waiver of trial rights and stated that every reasonable presumption need not be indulged against voluntary relinquishment. *Id*. at 243. This distinction begs the question of whether the relinquishment is, in fact, voluntary. Certainly the community's interest in aiding the discovery of evidence and apprehension of criminals does not go so far as to condone the extraction of unintended, involuntary consents. The lower courts' use of a presumption against the waiver of fourth amendment rights is an effective legal tool to assure the voluntariness of consents.

significantly, the existence of voluntary consent has always turned on a determination of whether permission to search was in fact given, and given voluntarily, not upon some abstract assessment of whether a hypothetically objective police officer would have reasonably believed that a voluntary consent had been conveyed. *E.g.*, ***Mendenhall*** at 544; ***Schneckloth*** at 222, 230 ("[t]he very object of the inquiry [is] the nature of a person's subjective understanding . . ."), 233; ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968); ***United States v. Leary***, 846 F.2d 592, 599 (10th Cir. 1988)(consent to search must be voluntary in fact).

The factors courts examine in determining the validity of consent have been carefully selected, *inter alia,* for their ability to ferret out whether voluntary consent has been, in fact, given. These factors include the consenter's age, education, and intelligence level,[3] the

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[3] ***Scheneckloth*** at 226; *see* ***Mendenhall*** at 558.

"possibly vulnerable subjective state of the person who consents,"[4] and the consenter's belief that no incriminating evidence will be found.[5] This analysis stands in sharp contrast to the analysis prescribed for testing whether a person has been "seized" for fourth amendment purposes which is designed to determine whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Michigan v. Chesternut,*** 486 U.S. 567, 573 (1988)(*quoting* ***Mendenhall*** at 554).[6]

The historical requirement of voluntary consent, in

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[4] ***Schneckloth*** at 229.

[5] ***United States v. Gonzalez-Basulto***, 888 F.2d 1011, 1013 (5th Cir. 1990); ***United States v. Blake***, 888 F.2d 795, 798 (11th Cir. 1989); ***United States v. Crespo***, 834 F.2d 267, 272 (2d Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988).

[6] This court is examining the application of this test this Term in ***Florida v. Bostick***, No. 89-1717 (argued February 26, 1991), and ***California v. Hodari, D.,*** No. 89-1632 (argued Jan. 14, 1991).

fact, is based upon the significant distinction between searches conducted pursuant to warrants and other probable cause related exceptions to the warrant requirement, and searches conducted pursuant to consent. When a law enforcement officer searches pursuant to a warrant or a probable cause related exception, "the situation is instinct with coercion . . .." *Bumper*, 391 U.S. at 550. The authority to search arises from circumstances over which the target has no control; the target is compelled to acquiesce in the search. On the other hand, consent searches arise from situations, at least in theory, antithetical of coercion. They are permitted only to the extent that the target is willing to freely and voluntarily waive the protection otherwise provided by the fourth amendment. They are strictly limited by the subjective intent of the consenting person. Any search beyond that subjectively intended by the consenter, by reason of misunderstanding or otherwise,

is one wholly lacking in authority and constitutional justification.

The question of whether the scope of a search conducted pursuant to consent extends to a particular area or item is, more accurately stated, whether the subject gave voluntary consent, in fact, to search the targeted area or item. Because the authority for these searches derives exclusively from the suspect's waiver of fourth amendment rights, their polestar, as with all other issues concerning the existence of consent, is the subjective intent of the consenter. Thus, as this Court stated in ***Schneckloth***, the search of the targeted area or item is only justified if the suspect, in fact, gave voluntary consent.

Stated still another way, the relevant question is whether the person impliedly consented to the search of the targeted area or item. In this context, as well, courts uniformly inquire whether the person, in fact, intended

by words or conduct to consent to a search of the area or item in question. *See* ***United States v. Most***, 876 F.2d 191, 199 (D.C. Cir. 1989); ***United States v. Leary***, 846 F.2d 592, 599 (10th Cir. 1988). The courts do not inquire as to whether a "reasonable" person would have inferred consent from the individual's conduct or statements. Instead, the question is and must be, whether the person, in fact, gave a voluntary consent.[7]

The United States, and to a lesser extent the Petitioner, rely on this Court's decision in ***Illinois v. Rodriguez***, __ U.S. ___ 110 S.Ct. 2793 (1990) for the proposition that the relevant inquiry in determining the existence of consent is "what an objective viewer, knowing all the facts, would understand to be the scope of the consent granted," and not whether "an individual

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[7] The Petitioner's postulation that "the voluntariness of the consent is not at issue," Brief at 12 n.2, is unsupported and legally erroneous. The analysis above demonstrates that voluntariness is precisely the issue to be determined.

subjectively intends to consent to only a limited search." Brief of the United States at 10. As is stated *supra*, this proposed rule contradicts the long standing rule developed in cases like ***Bumper*** and ***Schneckloth***, that the existence of consent must be determined with reference to the purportedly consenting party's subjective intent. Moreover, such a rule would extend unnecessarily and improvidently beyond the pale of ***Rodriguez***.

In ***Rodriguez***, this Court was confronted with the question of whether the validity of third-party consent turns on the existence *vel non* of the third-party's authority or a determination of whether "the facts available to the officer at the moment . . . "warrant[ed] a man of reasonable caution in the belief" that the consenting party had authority over the premises." *Id.* at 2801. In adopting the latter rule, this Court reviewed several fourth amendment scenarios in which the objective "reasonableness" requirement applies and

determined there was "no reason to depart from this general rule with respect to facts bearing upon the authority to consent to search." *Id.* at 2800 (emphasis added). The Court further explained, "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Id.*

Clearly, the rule of ***Rodriguez*** does not extend to the instant case. In ***Rodriguez***, there was no question that the third party, in fact, voluntarily consented to the police officers searching the defendant's apartment. The officers acted on her express, subjective intent to authorize their search. The Court adopted the objective reasonableness approach only to the question of whether the third-party had authority to consent.

In the instant case, there is no question but that Respondent Enio Jimeno had authority to consent to the search of the car he was driving. The question raised is

whether the scope of the search conducted comported with the scope of the search authorized. In other words, this Court must determine whether the Respondent, in fact, consented to a search of the paper bag and did so freely and voluntarily. The case of ***Rodriguez*** does not even purport to apply an objective reasonableness test to this issue.

The reasoning of ***Rodriguez*** also fails to extend to the instant case. In applying the "reasonableness" test to the question of whether one has authority to consent, this Court appeared to indicate it was primarily concerned with the difficulty police officers encounter in applying their judgment to complex and quickly unfolding factual scenarios to determine the extent of their authority in conducting criminal investigations. *See id.*, 110 S.Ct. at 2800. In determining the scope of consent, there is no call for the application of a law enforcement officer's judgment. The officer is not attempting to carry out the

will of a magistrate who is not present and is unable to clarify the details of a scenario possibly not contemplated by the magistrate at the time of the search. *See id.* at 2799. The officer is not being required to react to a quickly developing situation involving the arrest of a felon where the officer's safety is on the line. *See id.* at 2799-2800. The officer is not being required to make a complicated determination of whether a particular individual has sufficient rights and interest regarding a particular place to authorize that person to consent to a search. *See id.* Instead, we are concerned with a situation where the polestar for the officer's search, the individual consenting to the search, is present and able to quickly and easily clarify any doubts about the nature and scope of the officer's authority to search. This is a type of search for which neither the constitution nor practicalities relegate police officers to act upon probabilities; absolute certainty can and must govern the

nature and scope of the officer's conduct.

Relaxing the prosecution's burden in justifying consent searches from establishing voluntary consent in fact to merely establishing that a reasonably objective officer would have understood consent to have been granted would fully unanchor this doctrine from its analytical mooring - scrupulously adhering to the free will of the consenter. For without the free and voluntary will of the consenter, absent warrant or circumstances establishing any other exception to the warrant requirement, the police officer has no justification, whatsoever, to invade the consenting party's well-recognized, reasonable expectation of privacy. The authority to consent would be taken from the person whose rights are being violated and placed in the hands of a hypothetically objective police officer whose perception of the authority granted may differ substantially from the intent of the person conveying

authority. This the fourth amendment prohibits.

There is nothing inconsistent with resorting to a "reasonableness" test in determining a third-party's authority to consent to a search, ***Rodriguez***, and holding fast to a requirement of voluntary consent <u>in fact</u> when determining the existence of consent to search a particular area or item. In ***Schneckloth***, the Court relied upon the voluntariness test of its confession cases to establish an analytical framework for determining the voluntariness of consent. It acknowledged that the basis for this voluntariness test is found, at least in part, in "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair . . . police tactics poses a real and serious threat to civilized notions of justice." *Id.*, 412 U.S. at 225.

Where police rely upon third party consent to justify a search, there is no question concerning

deceptive, coercive, or other unfair tactics. The third-party has, in fact, given consent and given it voluntarily. Nothing the police can do can provide the third-party with more authority to justify the search. This is the same where police search pursuant to a warrant or probable cause in conjunction with exigent circumstances. Hence, we forego nothing in deterring police deception and abuse by resorting to a "reasonableness" test.

On the other hand, when the question involved concerns whether, in fact, a person has voluntarily consented, police have tremendous incentive to employ deception, coercion, or other abuses to increase their chances of securing consent. Clearly, police employment of these tactics violates the Constitution's notion of fundamental fairness. Thus, it is not inconsistent with resorting to an objective "reasonableness" when determining the authority of a third-party to consent, while maintaining closer scrutiny of police conduct by

examining the target's subjective intent when determining the existence and voluntariness of consent. *See* W. LaFave, *Search and Seizure,* § 8.1(b) at 159-60 (2d ed. 1987).

B. AN OFFICER MUST OBTAIN SPECIFIC AUTHORIZATION TO SEARCH THE SPECIFIC OBJECT OR AREA OF SUSPICION TO PREVENT COERCION, DECEPTION, AND OTHER ABUSES RESULTING IN SEARCHES UNAUTHORIZED BY THE SUBJECT.

In determining the existencce of voluntary consent, the courts' central concern is that the consenter's free will must not be overborne by "duress or coercion, express or implied". ***United States v. Mendenhall***, 446 U.S. 544, 557 (1980). Courts must take account of "subtle coercive police questions." ***Schneckloth*** at 229. "Acquiescence to a claim of lawful authority" does not constitute consent. ***Bumper v. North Carolina***, 391 U.S.

constitute consent. ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968). Deceit, trickery, and misrepresentation are certainly within the pale of coercion. ***See United States v. Briley,*** 726 F.2d 1301, 1304 (8th Cir. 1984); ***United States v. Turpin***, 707 F.2d 332, 334-35 (8th Cir. 1983); ***United States v. Twell***, 550 F.2d 297, 299 (5th Cir. 1977); ***United States v. Alexander***, 390 F.2d 101, 109-10 (5th Cir. 1968). "Where there is coercion there can be no consent." ***Bumper*** at 550. Accordingly, the primary purpose of the factor's examined to deetermine the voluntariness of consent is to uncover the existence of any coercion that might vitiate consent. For instance, though not outcome determinative, a suspect's knowledge of the right to refuse consent is especially significant. ***Mendenhall*** at 558-59; *see* ***United States v. Jones***, 846 F.2d 358, 360-61 (6th Cir. 1988); ***United States v. Cherry***, 794 F.2d 201, 206 (5th Cir. 1986), *cert. denied,* 479 U.S. 1056 (1987). Other

factors also reflecting this Court's concern with the danger of police abuse include the length of detention and nature of the questioning, ***Schneckloth*** at 226, and the use of physical punishment and other intrusive police behavior. *Id.; see* ***Florida v. Royer***, 460 U.S. 491, 501-07 (1983); ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975); ***Wong Sun v. United States***, 371 U.S. 471, 485-87 (1963).

In an ideal world, in the absence of a warrant, probable cause in conjunction with exigent circumstances, or one of the other well-recognized exceptions to the fourth amendment, any search conducted pursuant to a suspect's purported voluntary consent would go no further and be no more extensive than the suspect subjectively intends. This is because the sole authority and justification for such a search is that the consenting person has permitted it. It would be totally inconsistent with this exception to condone searches conducted reasonably (though erroneously) beyond the scope actually intended.

Our world is not perfect. Thus, although this Court in ***Schneckloth*** recognized the relevance and importance of a person's knowledge that consent may be withheld in evaluating whether consent was voluntary, *id.* at 229-30, it cited impracticality as the reason for not requiring proof of knowledge of the right to refuse consent as an essential prerequisite to voluntary consent. *Id.* at 231-33. However, this Court still emphasized that "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implying threat or covert force," *id.* at 228, and that "[t]o approve such searches without the most careful scrutiny would sanction the possibility of official coercion." *Id.* at 229.

In evaluating whether consent was, in fact, given voluntarily and reflects the free will of the consenter, a court must account for two factors bearing on the person's decision. First, although the type of voluntary

consent which justifies by-passing the fourth amendment's warrant requirement is supposed to be a product of the consenter's free will in an environment free of police coercion, this is an unattainable fictional goal. It is well recognized that there is always an element of coercion inherent in any confrontation between police and a citizen. *Cf.* ***United States v. Berry***, 670 F.2d 583, 596 (5th Cir. Unit B 1982)(*en banc*)(coercion inherent in all contacts between law enforcement officers and air-travellers at airport). This inherent coercion is particularly weighty when as in the instant case a police officer in some way asserts his official authority and advises the citizen that he suspects involvement in criminal activity. ***Royer***, 460 U.S. at 496; ***United States v. Galberth***, 846 F.2d 983, 990 and n.11 (5th Cir. 1988); ***United States v. Gonzalez***, 842 F.2d 748, 752 (5th Cir. 1988); *see* ***Mendenhall***, 446 U.S. at 554.

Second, a police officer seeking consent has a

tremendous incentive to employ coercion or deceit for the purpose of securing consent. Typically, consent is sought where police, acting upon a hunch, speculation, or conjecture, want to search a particular area for evidence of crime. They have no hope of establishing probable cause to secure a search warrant or of mustering the requisite circumstances necessary to invoke any other exception to the fourth amendment's warrant requirement. Absent consent, the officer will be unable to carry out the search which he subjectively believes will lead to evidence of criminality. Thus, it would be entirely natural for an officer to exploit any coercive factor inherent in a police-citizen encounter and to use any other means of subtle coercion or deception to obtain the consent that constitutes the key to furthering the criminal investigation.

Requiring an officer to clarify the scope of an individual's consent or, in other words, requiring the

officer to ascertain whether the subject, in fact, consents to a search of the specific object of suspicion would do much to prevent, or at least minimize, the coercion and deception inherent in a police-citizen confrontation. Such a requirement would assure that the search being carried out is no more extensive than the consent being given. Additionally, there is nothing impractical about making such an inquiry. It is certainly no less practical than the inquiry which generally precedes any consent search: "May I have permission to search your _____?" It does no more than to assure that there is, in fact, a voluntary consent.

The instant case exemplifies the scenario in which a person's consent is typically obtained and the role which subtle coercion and deception typically play in securing that consent. At the time the Respondents were stopped in the vehicle, they were expressly accused by a law enforcement officer of committing a traffic infraction.

Now vulnerable to the officer's decision to issue a traffic citation, the officer further advised Respondent Enio Jimeno that he was suspected of carrying narcotics in his car. With the interplay of Jimeno's vulnerability to the officer's decision regarding the traffic infraction and the accusation of a narcotics violation, the officer deceptively requested permission to search the car instead of the bag which was the true object of his suspicion.

Although the United States speculates as to the reasons why Respondent Enio Jimeno would have consented to a search of his car knowing that the brown paper bag containing the kilo of cocaine lay on the floor board on the passenger side, it fails to acknowledge the most obvious reason: the consent to search the vehicle did not extend to the closed paper bag which concealed the contraband from any one observing it from the outside. Although the officer testified he told Respondent Enjo Jimeno he could tell the officers to

stop at any point during the search, it is apparent that Respondent Enio Jimeno had little opportunity given that the officer walked directly to the part of the car where he knew the bag had been placed, seized the bag, and opened it. Thus, the officer employed subtle coercion and deception to secure consent to search the car and to prevent any objection to the search. To permit the type of search would be to condone use of the type of subtle coercion and deception employed by the officer that are the very antithesis of a voluntary consent. Requiring the officer to obtain specific authorization to search the specific object or area of suspicion would prevent this type of coercion and deception.

The United States' request that this Court implant the rule of ***United States v. Ross***, 456 U.S. 798 (1982), on the doctrine of consent to determine the scope of a general consent to search an automobile is like requesting this Court to ignore the significant distinction

between apples and oranges. Although they are both fruits, they are different in color, taste, texture, and nearly every other respect. Indeed, this court in ***Ross*** repeatedly stressed the importance of the requirement that officers have probable cause to believe the vehicle contained contraband. *Id.* at 807-09. While the automobile search of containers approved in ***Ross*** was compelled by the existence of probable cause to believe that the automobile contained contraband, in a consensual search, there is, at least in theory, no compulsion. The sole authority by which an officer proceeds in a consensual search is that, in fact, given voluntarily by the subject. If the subject does not grant consent to search a container within the vehicle, there is no compulsion or other authority by which to conduct such a search.

C. REQUIRING THE OFFICER TO OBTAIN SPECIFIC AUTHORIZATION TO SEARCH THE OBJECT OR AREA OF SUSPICION IS NECESSARY TO SIMPLIFY THE ADMINISTRATIVE BURDEN ON THE COURTS IN RESOLVING MOTIONS TO SUPPRESS BASED PURPORTEDLY UPON CONSENT AND TO INSURE THE ACCURACY OF THOSE DETERMINATIONS.

One of the most effective rules concerning police investigation conceived by this court is the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). The rule, designed to insure the voluntariness of all custodial confessions requires a police officer to advise any suspect subject to custodial interrogation of his right to remain silent and to counsel. Although the rule has unquestionably placed a burden on the ability of police to conduct effective investigations, it was deemed justified by the importance of preventing coerced confessions which cut so sharply against the grain of

fundamental fairness that is so central to our constitutional fabric. Despite this burden, the "bright-line" rule of ***Miranda*** has been lauded for its ease of application both on the streets and in the courts. *E.g.*, ***New York v. Quarles***, 467 U.S. 649, 661-64 (1984) (O'Connor, J., concurring and dissenting in part).

The rule Respondents propose, requiring a law enforcement officer to obtain specific authorization to search the object or area of suspicion has this same virtue. The rule would provide a quick and simple answer for law enforcement officers involved in quickly developing investigations who are otherwise faced with innumerable difficult issues and dilemmas that must be instantly resolved to effectively carry out the investigation. Requiring the officer to specifically request permission to search the object or area suspected of containing contraband would remove all guess work on the part of the officer regarding what may and what may

not be searched. It would also substantially diminish the number of searches that are erroneously conduct beyond the scope of the consenter's free and voluntary will which is the polestar of these types of searches. The rule would likewise reduce the administrative burden on our state and federal courts which spend hours upon hours meticulously culling through volumes of testimony and evidence attempting to determine the subjective intent of defendants which the searching police officers failed to elicit prior to the searches. For all of these reasons, a bright-line rule requiring police officers to elicit consent to search the specific areas or objects of their suspicions should be adopted by this Court.

D. ANY DISTINCTION IN THE PERMISSIBLE SCOPE OF A CONSENT SEARCH BASED ON THE NATURE OF THE CONTAINER ENCOUNTERED WILL DENY EQUAL PROTECTION AND RESULT IN IMPERMISSIBLE DISCRIMINATORY APPLICATION OF THE FOURTH AMENDMENT.

It is unquestionable that the fourth amendment's prohibition against unreasonable searches of persons, houses, papers, and effects guards against unreasonable governmental intrusion into any receptacle that might contain personal effects. *E.g.*, ***United States v. Chadwick*** , 433 U.S.1, 7-9 (1977). It is further clear that all containers whose contents are not apparent from their outward appearance are protected equally by the fourth amendment. ***Robbins v. California***, 453 U.S. 420, 425-27 (1981). As this court explained in ***Ross***, the central purpose of the fourth amendment forecloses any distinctions:

> For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveller who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim and equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Id. at 822.

The rule proposed by the United States, that general consents to search automobiles include the authority to open any closed container, such as a paper bag, that can be opened without causing significant property damage, and excluding closed containers like locked briefcases that cannot, draws an impermissible distinction between the protection afforded to a pauper and an aristocrat. Such a rule would force the pauper to forfeit his expectation of privacy in the only container he can afford to protect his most valuable belongings when

he is deceived to utter words intended only to authorize a limited search but which, by law, is deemed to authorize a greater search. On the other hand, this rule would protect the incriminating evidence of the rich man who uttered the exact same words, even where these words were, in fact, intended by him to extend to a secure receptacle such as a locked briefcase.

It cannot be denied that the container of choice of members of the lower economic strata is a paper or opaque plastic bag. They use them to collect and carry their toiletries, private papers, and other items they seek to keep private from the world around them. Unfortunately, these containers are also sometimes used to carry drugs. Our constitution, which guarantees due process and equal protection under the law to all, would not countenance the invidious distinction between rich and poor that is central to the rule proposed by the United States'. For this reason, it must be firmly

rejected.

While it may be argued that requiring police officers to elicit specific and unequivocal consent to search areas they would not normally be entitled to search might, in some cases, result in the police failing to discover evidence of a crime, it must be recognized, as this Court has recently noted: ". . . there is nothing new in the realization that the constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." ***Arizona v. Hicks*** 480 U.S. 331, 339 (1987).

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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